

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

## **SYNOPSIS REPORT**

### **Decisions Issued in September 2008**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

**NOTICE:** These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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**KEYWORDS:** EXTRACURRICULAR; COACHING; CONTRACTS;  
COMPENSATION

**CASE STYLE:** MARTIN, ET AL. v. BARBOUR COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-1178-CONS (9/30/2008)

**PRIMARY ISSUES:** Whether Respondent deprived Grievants of Due Process when it voted to accept a change in the pay for extracurricular coaching contracts for the 2008-2009 school year.

**SUMMARY:** Respondent accepted a coaching compensation plan for the 2008-2009 school year that would change the pay for those entering into mutual agreed upon coaching contracts. Grievants argued this violated Due Process because they would be unable to obtain a fair hearing on the issue of any change of compensation that may result in their individual coaching contracts. Respondent asserted that the coaching contracts were mutually agreed upon and it had the authority to offer different terms, just as the Grievants had the authority to reject any/all terms of the contract. Respondent also argued that merely voting to accept the new compensation plan did not mean it had prejudged any hearing or complaints that may be issued on the topic. Grievance is DENIED.

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**KEYWORDS:**

LESSON PLANS; PREPARATION; TECHNOLOGY;  
PROFESSIONAL PRACTICE

**CASE STYLE:**

BYRD, ET AL. v. KANAWHA COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-0749-CONS (9/22/2008)

**PRIMARY ISSUES:**

Whether Grievants should be required to submit their lesson plans in an electronic format.

**SUMMARY:**

Grievants are employed as teachers at Weberwood Elementary School. Their Principal advised all of the teachers he was going to require that all teacher lesson plans be prepared electronically, and the lesson plans be provided to him by email weekly. In addition, Respondent requires the inclusion of specific teaching technique strategies utilized daily by all teachers. Grievants assert that lesson plans serve one purpose, to be a guide to the teacher and substitute for presentation of the curriculum. Items which do not serve as a guide to the teacher and substitute for daily instruction should not be required in the lesson plans. Respondent counters that teachers are required to demonstrate a sound understanding of technology operations and concepts, and use technology to enhance productivity and professional practice. The inclusion of teaching technique strategies in the lesson plan is not required to serve as a guide to the teacher or substitute for daily instruction. However, requiring teachers to prepare and submit their lesson plans in electronic format does not violate any applicable provision of law, and is within the statutory authority granted to a principal. GRANTED IN PART, AND DENIED IN PART.

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**KEYWORDS:** SELECTION; ARBITRARY AND CAPRICIOUS

**CASE STYLE:** SMITH v. MINGO COUNTY BOARD OF EDUCATION  
DOCKET NO. 06-29-422 (9/17/2008)

**PRIMARY ISSUES:** Whether Grievant's non-select for the position of Reading Mentor Teacher was an improper, or arbitrary and capricious decision by Respondent.

**SUMMARY:** Grievant, a teacher employed by the Mingo County Board of Education, challenged her non-selection for the position of Reading First Mentor Teacher, asserting that she was better qualified than the successful applicant. Grievant and two other candidates applied and interviewed for a newly created Reading Mentor Teacher position at Kermit K-8. Respondent maintains it properly evaluated the candidates, determining that an applicant other than Grievant was more suited for the position. Respondent provided a proper rationale for selecting the successful applicant which included the statutory selection criteria applicable to county boards of education. Grievant failed to establish by a preponderance of the evidence that the selection was arbitrary and capricious or clearly wrong. Grievance DENIED.

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**KEYWORDS:** SELECTION; ASSISTANT SUPERINTENDENT; QUALIFICATIONS

**CASE STYLE:** SPENCE, SR. v. MCDOWELL COUNTY BOARD OF EDUCATION AND DEPARTMENT OF EDUCATION  
DOCKET NO. 2008-0957-McDED (9/26/2008)

**PRIMARY ISSUES:** Whether Grievant could challenge his non-selection for the position of assistant superintendent.

**SUMMARY:** Grievant argues that he is the most qualified applicant for the position of assistant superintendent. Grievant seeks placement into that position pursuant to the criteria set out in W. Va. Code § 18A-4-7a. Respondent West Virginia Department of Education argues that this section is not controlling because McDowell County Board of Education is under state intervention. As such, the State Superintendent has the sole discretion to hire administrators in counties under intervention without regard to the provisions of W. Va. Code § 18A-4-7a. Because Grievant has asserted no basis for this grievance other than the alleged failure to comply with § 18A-4-7, which is not controlling, this grievance fails to state a claim upon which relief can be granted. This grievance is dismissed.

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**KEYWORDS:** SELECTION; PRINCIPAL; QUALIFICATIONS; FIRST SET OF FACTORS; SUPERINTENDENT'S RECOMMENDATION

**CASE STYLE:** PAESANO SHUTE v. BROOKE COUNTY BOARD OF EDUCATION  
DOCKET NO. 07-05-402 (9/26/2008)

**PRIMARY ISSUES:** Should Grievant have been the successful applicant for a principal's position, and was the process flawed?

**SUMMARY:** Grievant contends that she should have been selected over Joyce Rea for the position of Principal at Brooke High School. She argues that the selection process was flawed, the statutory criteria were not appropriately evaluated, she was more qualified, and the Board erred by not conducting its own investigation of the applicants' qualifications. □ Evidence established that an interview committee was properly appointed, interviews conducted, and a consensus was reached regarding the recommendation of Ms. Rea, based upon her more relevant experience at the high school level, and particularly because she was already a Brooke High School administrator. The statutory criteria were evaluated and considered, the selection of Ms. Rea was based upon relevant considerations, and it did not reflect an abuse of the Board's ample discretion in such matters. Moreover, pursuant to statute and established case law, it is the superintendent's job to assess the applicants' qualifications, not the board of education's. Grievance DENIED.

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**KEYWORDS:** TERMINATION; TIMELINESS; AVAILABLE REMEDY; SUBJECT MATTER JURISDICTION

**CASE STYLE:** MURPHY v. PLEASANTS COUNTY BOARD OF EDUCATION  
DOCKET NO. 2008-0310-PlED (9/26/2008)

**PRIMARY ISSUES:** Whether grievance was timely and whether Grievant was requesting a remedy wholly unavailable through the grievance procedure.

**SUMMARY:** Grievant seeks to challenge the County Superintendent's failure to sign her application for certification. Grievant asserts that the County Superintendent's refusal to endorse her applications was arbitrary, capricious, and an abuse of authority. Respondent asserts that the grievance is not timely. In addition, Respondent argues that the relief requested by Grievant is unavailable as speculative or premature. Finally, Respondent points out that the Grievance Board does not have jurisdiction over the State Superintendent of Schools to order that Grievant be issued a certification to teach. The Motion to Dismiss is GRANTED.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	SUBSTITUTE, STEP-UP, DEMOTION, DUE PROCESS, ARBITRARY AND CAPRICIOUS
<b><u>CASE STYLE:</u></b>	<u>MULLINS v. KANAWHA COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-20-404 (9/16/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant was entitled to due process prior to being demoted from a substitute supervisory position.
<b><u>SUMMARY:</u></b>	Grievant was “stepped up” to her supervisor’s position as a substitute to cover a long-term absence. Her performance faltered, and at her own request she was given two weeks to improve. She did not improve, partly because she was absent due to family emergency for one of the weeks. Held that Respondent’s action in removing her from the supervisory position was improper. Grievance GRANTED.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	CLASSIFICATION; REALLOCATION; DUTIES; ASSISTING; READER
<b><u>CASE STYLE:</u></b>	<u>MCLAUGHLIN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND DIVISION OF PERSONNEL</u> DOCKET NO. 07-HHR-369 (9/26/2008)
<b><u>PRIMARY ISSUES:</u></b>	Was Grievant misclassified while assisting a legally blind Economic Service Worker?
<b><u>SUMMARY:</u></b>	Grievant contends that, while assigned to be a “reader” for a legally blind Economic Service Worker, she was misclassified as an Office Assistant 2. She believes that, because of the types of duties she was required to perform in order to help the Economic Service Worker read information from the computer, perform financial calculations, and interview clients, she was performing the duties of his classification, rather than her own. However, the evidence revealed that Grievant did not determine eligibility for benefits or make determinations regarding action necessary in any given case, which are the responsibility of the Economic Service Worker. By assisting the Economic Service Worker, she was performing the assigned duties of an Office Assistant 2, and she did not prove misclassification. Grievance DENIED.

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**KEYWORDS:** DISMISSAL; ARBITRARY AND CAPRICIOUS; CAUSE

**CASE STYLE:** BRAGG v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS  
DOCKET NO. 2008-1522-CONS (9/29/2008)

**PRIMARY ISSUES:** Whether Respondent had just cause to terminate Grievant's employment.

**SUMMARY:** Grievant pursued a consolidated grievance alleging that the Respondent suspended and ultimately terminated her without "good cause." Subsequent to a thirty day suspension, Grievant was terminated, after having been observed sleeping at her desk, as well as being found in an impaired state at work to the extent Grievant was not able to perform work duties. Grievant's thirty day suspension was the result of her attempt to use Sick Leave for a time period where it was determined that Grievant was unavailable for work because she was incarcerated. Throughout Grievant's tenure of employment she had received various forms of progressive discipline ranging from warnings to suspensions. Respondent demonstrated by a preponderance of the evidence that Grievant's continued violation of workplace standards was just cause for her dismissal. Grievance DENIED.



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**KEYWORDS:** INTERVIEW; ARBITRARY AND CAPRICIOUS

**CASE STYLE:** JOHNSON v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES  
DOCKET NO. 07-HHR-083 (9/22/2008)

**PRIMARY ISSUES:** Whether Grievant should have been interviewed for a Supervisor position.

**SUMMARY:** Grievant alleges that she should have been interviewed for a Child Support Supervisor 2 position posted by the Bureau for Child Support Enforcement. Grievant asserts a violation of Department of Health and Human Resources Policy Memorandum 2106 and the Division of Personnel Administrative Rule on the hiring of applicants. Grievant is employed by the Bureau of Children and Families. Respondent counters that they had a number of qualified applicants from within the Bureau of Child Support Enforcement ("BCSE"). Accordingly, BCSE chose to interview candidates who were already BCSE employees. The evidence established that Respondent BCSE had enough qualified internal applicants. BCSE reasoned that they wished to promote from within, from a pool of applicants who knew current BCSE duties, policies and practices, and to afford all BCSE employees opportunity to advance from within. Respondent's decision was reasonable, and it was not arbitrary and capricious. Therefore, the grievance is denied.

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**KEYWORDS:** MISCLASSIFICATION, DUTIES

**CASE STYLE:** CAYE/STICKLEY v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT AND DIVISION OF PERSONNEL  
DOCKET NO. 2008-0838-CONS (9/23/2008)

**PRIMARY ISSUES:** Whether Grievants are misclassified as Administrative Secretaries when they should be Executive Secretaries.

**SUMMARY:** Grievants claimed they were misclassified as Administrative Secretaries, because they are each assigned to support a Deputy Commissioner within the DHHR, and they believed other Deputy Commissioners were supported by Executive Secretaries. They did not meet their burden of proving that the job duties assigned to their specific positions more closely matched the Executive Secretary class specifications. Grievances DENIED.

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**KEYWORDS:** MISCLASSIFICATION, REALLOCATION, COMPLEXITY, INCREASING DUTIES, BEST FIT

**CASE STYLE:** BAKER v. INSURANCE COMMISSION AND DIVISION OF PERSONNEL  
DOCKET NO. 2008-0591-DOR (9/30/2008)

**PRIMARY ISSUES:** Whether Grievant's position should be classified as Tax Audit Clerk Senior rather than Tax Audit Clerk.

**SUMMARY:** Grievant has been employed as a Tax Audit Clerk since 1996, and in that time her job duties have changed. With the increasing complexity of her duties and the taxes with which she works, the predominance of her duties shifted to fall more within the Tax Audit Clerk Senior classification than her former classification. Grievance GRANTED.

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**KEYWORDS:** MOTION TO DISMISS; TIMELINESS

**CASE STYLE:** SPRADLING v. STATE TAX DEPARTMENT  
DOCKET NO. 07-TD-348 (9/17/2008)

**PRIMARY ISSUES:** Whether Grievant is entitled to a pay increase due to an alleged promise made by her superior more than ten years ago.

**SUMMARY:** Grievant filed a grievance in 2007 alleging that she was promised by her superior in 1993 that she would receive a pay raise to become effective at the end of fiscal year. Grievant did not receive the identified raise. Grievant did not file a grievance in 1994 nor 1995 regarding this issue. Respondent asserts that the grievance was untimely and that, in any event, any promise made (if made) was ultra vires and did not vest Grievant with an enforceable right.  
The denial of a one time pay increase is not a continuing violation. As an alleged continuing damage—case, this grievance is subject to the applicable statutory time period for filing a grievance. Grievant knew in 1995 that she did not receive a merit raise. The grievance as filed in 2007 is untimely and the alleged ultra vires promise does not entitle Grievant to a pay raise. Grievance DENIED.

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**KEYWORDS:** PAST PRACTICE, ARBITRARY AND CAPRICIOUS, SENIORITY

**CASE STYLE:** KINCAID/SKIDMORE v. PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY

DOCKET NO. 07-PEDTA-127 (9/29/2008)

**PRIMARY ISSUES:** Whether new guideline basing seniority on time in classification rather than initial hire date violate policy or past practice?

**SUMMARY:** Grievants contend they were denied the opportunity to choose vacation times by guidelines established by the PEDTA which changed how seniority was calculated for vacation priority. They allege the guidelines violate past practice in the calculation of seniority that allows both part-time and full-time toll collectors to compete for vacation days based upon their initial hire date in either category. They also claim the guidelines violate PEDTA Personnel Policy III-4 by adopting a definition of seniority that was not previously utilized for toll collectors. There is no specific definition of seniority in the policy and PEDTA was able to demonstrate reasons for the calculations that were reasonably related to the differences in the classification of employees that were not arbitrary or capricious. Grievance is denied.

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**KEYWORDS:** SELECTION, SENIORITY, QUALIFICATIONS, ARBITRARY AND CAPRICIOUS, AGENCY DISCRETION

**CASE STYLE:** MORGAN v. DIVISION OF HIGHWAYS

DOCKET NO. 07-DOH-352 (9/18/2008)

**PRIMARY ISSUES:** Whether grievant should have been selected for a job.

**SUMMARY:** Grievant was not selected for a Transportation Crew Supervisor 1 position, although he had more seniority than the applicant who was hired. Grievant did have more seniority and more supervisory experience, but the selection criteria was weighted heavily with the subjective judgment of the two evaluators who knew both the applicants and the job well, and in their overall judgment, another applicant was better qualified. Grievant did not meet his burden of proving the selection process was improper. Grievance DENIED.